

Steve W. Berman (*pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com

Shana E. Scarlett (217895)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
shanas@hbsslaw.com

*Lead Counsel for Indirect
Purchaser Class*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE OPTICAL DISK DRIVE PRODUCTS
ANTITRUST LITIGATION

No. 3:10-md-2143 RS (JCS)

INDIRECT PURCHASER PLAINTIFFS'
BRIEF ON FURTHER CLASS NOTICE

This Document Relates to:
ALL INDIRECT PURCHASER ACTIONS

1 The Court recently instructed Indirect Purchaser Plaintiffs (IPPs) to “file a brief addressing
 2 what notice to the class is required, if any, when a ‘renewed’ motion for attorney fees is brought after
 3 a prior award has been vacated and the matter has been remanded for further proceedings.”¹ In short,
 4 although there appears to be scant precedent addressing these or similar circumstances, further notice
 5 is fully within this Court’s discretion under Rule 23. As the Court requested, therefore, IPPs will
 6 “propose a timetable for such notice, any objections, and any reply.”²

7 Rule 23 does not distinguish between class notice before any appeal and notice that may be
 8 necessary or prudent if the Court of Appeals remands for further proceedings. Nonetheless, as part of
 9 its broad grant of judicial authority, Rule 23 expressly permits further notice on any subject. In
 10 “conducting the action,” this Court “may issue orders” that “require—to protect class members and
 11 fairly conduct the action—giving appropriate notice to some or all class members” of “any step in
 12 the action.”³ The further notice the Court suggests is consistent with Rule 23 notice prerequisites
 13 specific to attorney fee motions made in the first instance, before any appeal or remand.⁴

14 Some case law discusses notice principles not involving a renewed fee motion on remand.⁵
 15 To IPPs’ knowledge, the Ninth Circuit has not addressed any notice requirement where, as here, an
 16 attorney fee award is “remand[ed] for a more complete explanation” and “[m]ore detailed findings”
 17 on the reasons for the award.⁶ The authoritative Newberg treatise does not address this point.

18 Providing notice in these circumstances would be conservative, given that the class has
 19

20 ¹ Order Requesting Briefing Re Potential Notice Issue at 2, Jan. 20, 2021, ECF No. 2956.

21 ² *Id.*

22 ³ Fed. R. Civ. P. 23(d)(1)(B)(i) (capitalization omitted).

23 ⁴ Fed. R. Civ. P. 23(h).

24 ⁵ See, e.g., *In re Volkswagen “Clean Diesel” Mktg., Sales Practices & Prods. Liab. Litig.*, 895
 25 F.3d 597, 615 (9th Cir. 2018) (“In sum, approving a settlement before class counsel has filed a fee
 26 motion does not violate Rule 23(h). What matters is that class members have a chance to object to
 27 the fee motion when it is filed.”). As the Ninth Circuit has stated elsewhere, notice of fee motions
 28 serves important objectives: “Allowing class members an opportunity thoroughly to examine
 counsel’s fee motion, inquire into the bases for various charges and ensure that they are adequately
 documented and supported is essential for the protection of the rights of class members. It also
 ensures that the district court, acting as a fiduciary for the class, is presented with adequate, and
 adequately-tested, information to evaluate the reasonableness of a proposed fee.” *In re Mercury
 Interactive Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010).

⁶ *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 926, 937 (9th Cir. 2020).

1 already received notice of the request for attorneys' fees three times, including that the amount
 2 requested would be greater than what is requested now. Originally, Class Counsel requested \$47.78
 3 million in attorneys' fees plus \$5 million in expenses but now only requests \$47.78 million in
 4 attorneys' fees.

5 But to remove this issue and in light of the Court's discretion under Rule 23, IPPs propose to
 6 provide further class notice and to conduct further proceedings on the following timetable or as the
 7 Court otherwise instructs:

8 Event	Due Date
9 Supplemental Notice to Class on Attorney Fee Proceedings	March 1, 2021
10 Last Date for Notice Completion	March 31, 2021
11 Objections or Other Responses	April 30, 2021
12 IPPs' Reply to Objections or Other Responses	May 14, 2021

13 Attached as **Exhibit A** is a proposed form of notice for the class, notifying them as to their
 14 right to object to the request for attorneys' fees. Class Counsel proposes that the same notice
 15 administrator, Epiq, be used as was used for prior rounds of notice. The notice administrator will
 16 disseminate this notice to the Class by the same mechanisms as previously used (via direct notice to
 17 the class members for whom email contact information is available with supplemented indirect
 18 notice through an internet advertising campaign).

19 Class Counsel does not believe a further hearing is necessary, but remain available to answer
 20 any questions the Court may have, and are available to participate in a hearing should that be of
 21 assistance to the Court.

22 DATED: January 29, 2021

HAGENS BERMAN SOBOL SHAPIRO LLP

24 By s/ Shana E. Scarlett
 25 SHANA E. SCARLETT

26 715 Hearst Avenue, Suite 202
 27 Berkeley, CA 94710
 28 Telephone: (510) 725-3000
 Facsimile: (510) 725-3001
 shanas@hbsslaw.com

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